FENWICK ELLIOTT

The construction & energy law specialists

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

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Dispatch

Remote court hearings

Huber & Anr v X-Yachts (GB) Ltd & Anr

[2020] EWHC 3082 (TCC)

The trial here was fixed as a remote hearing. It could not have taken place in any other way as the parties were based in Spain and Denmark and could not travel to England at present. It was common ground that all witnesses of fact and expert witnesses could give their evidence by video link, whether from within or from outside the jurisdiction. There was no difficulty about this. The issue that arose was whether the parties and others could attend and observe the remote hearing from locations outside England and Wales, other than when giving evidence.

Mr Justice Kerr directed that there be a video only hearing pursuant to section 85A(1) of the Courts Act 2003 (added by section 55 of and schedule 25 to the Coronavirus Act 2020). This meant that he was empowered to direct further "that the proceedings are to be broadcast (in the manner specified in the direction) for the purpose of enabling members of the public to see and hear the proceedings" (s. 85A(1)(a)). The question was whether such "members of the public" must attend from a location in England and Wales, or whether they may do so from elsewhere.

X-Yachts said that whilst witnesses could give their evidence by video link from outside England and Wales, observers could not attend remotely from outside England and Wales. This would apply to witnesses, even if they were also parties, save when they were giving their evidence. They could not be permitted to attend the hearing remotely before or after giving their evidence, for example to hear what was said by another witness.

The Judge disagreed. The backdrop against which the 2020 Act was enacted included keeping the courts running as far as possible and using technological means to do so. Civil litigation in England and Wales frequently has international dimensions. Indeed, Mr Justice Kerr noted that long "before the pandemic, civil litigation here frequently included the now commonplace feature of remote attendance by a witness giving evidence from abroad".

It was also well known when the 2020 Act was passed that the prevalence of the virus and the concern of states to inhibit its spread were causing widespread restrictions on international travel and would lead to a commensurate increase in the use of electronic communication techniques to keep conversations going across international borders.

There was also a question of fairness, and Huber would be prevented, apart from when giving their evidence, from remotely attending the trial of their own case, being in Mallorca and unable to travel to England. Also, on X-Yachts' case, where a party's witnesses happened to be in the jurisdiction, they would be able to see and hear what other witnesses say, while witnesses located outside the jurisdiction would not.

When it came to what directions to give concerning the manner in which the proceedings were to be broadcast for the purpose of enabling persons to see and hear them, then that was a matter of discretion. Here the Judge was willing on a cautious basis to permit some remote attendance from abroad, subject to safeguards.

Specifically, the Judge referred to named attendees, including the parties and representatives, who could attend the full trial remotely. The Judge also required a list of attendees, providing details of the capacity in which they would attend, and the address from which they would do so, including email and telephone details.

The legal representatives on each side bore responsibility for informing all those attending remotely of the strict prohibition against any unauthorised dissemination of the hearing or making any sound or video recording of it. This is an important consideration, as this is very simple to do. They were also responsible for ensuring that any person or entity enlisted to provide technical support or assistance is made aware of those strict prohibitions.

Further, those attending, whether from inside or outside the jurisdiction, would have to provide a signed undertaking confirming that they were aware of the contents of the court's order and that they understood they were prohibited from broadcasting, disseminating or recording the proceedings further by any electronic means and that if they did so they may be found in contempt of court and liable to criminal penalties.

Arbitrator's appointment: appearance of bias

Halliburton Company v Chubb Bermuda Insurance Ltd

[2020] UKSC 48

The Supreme Court here had to consider when an arbitrator should make disclosure of circumstances which may give rise to justifiable doubts as to their impartiality.

Following the explosion and fire on the Deepwater Horizon drilling rig in the Gulf of Mexico, Halliburton commenced arbitration against Chubb, but were unable to agree on the appointment of a third arbitrator as chairman. An arbitrator (Chubb's proposal) was appointed by the court. Subsequently and without Halliburton's knowledge, that arbitrator accepted appointment as an arbitrator in two separate references also arising from the Deepwater Horizon incident, including one made by Chubb.

Halliburton applied to the court under section 24 of the Arbitration Act 1996 for the removal of the arbitrator. The CA held that, while the arbitrator should have disclosed his proposed appointment in the other arbitrations, an objective observer would not in the circumstances conclude there was a real possibility that they were biased.

The Supreme Court decided that as at the date of the hearing to remove the arbitrator, the fair-minded and informed observer would not have concluded that circumstances existed that gave rise to justifiable doubts about the arbitrator's impartiality. Lord Hodge said that when considering an allegation of apparent bias against an arbitrator, the test is whether the fair-minded and informed observer would conclude there is a real possibility of bias. This was an objective test, having regard to the particular characteristics of international arbitration, including the private nature of most arbitrations. This duty of disclosure was a legal duty in English law. However, that duty was a secondary obligation arising from the arbitrator's core duty to act fairly and impartially.

The arbitrator's duty of disclosure is to disclose matters which might reasonably give rise to justifiable doubts as to their impartiality, and a failure to disclose relevant matters is a factor for the fair-minded and informed observer to take into account in assessing whether there was a real possibility of bias. In assessing whether there has been a failure in the duty to make disclosure, the fair-minded and informed observer will have regard to the facts and circumstances as at and from the time the duty arose. This is different to the timing of any assessment about whether there was a real possibility that an arbitrator was biased. The relevant time for that was the time of the hearing to remove the arbitrator and not the time of the arbitrator's acceptance of the second arbitration.

Here, Lord Kerr accepted that there may be circumstances where the acceptance of multiple appointments involving a common party and the same or overlapping subject matter would give rise to an appearance of bias. It all depends on the facts and the customs and practice in the relevant field of arbitration. Here, in the context of a Bermuda Form arbitration, the arbitrator was under a legal duty to disclose such appointments unless the parties to arbitration had agreed otherwise.

So the arbitrator was under a legal duty to disclose the appointment in the subsequent reference involving Chubb. At the time of his appointment, the existence of potentially overlapping arbitrations with only one common party, Chubb, might reasonably have given rise to a real possibility of bias. The mere fact that an arbitrator accepted appointments in multiple reference concerning the same or overlapping subject matter with only one common party did not of itself give rise to an appearance of bias. Something more, of substance, was required.

However, at the time of the hearing to remove the arbitrator, and having regard to the circumstances known at the date of the hearing at first instance, it could not be said that the fair-minded and informed observer would infer from the arbitrator's failure to make disclosure that there was a real possibility of bias. After Halliburton found out about the second appointment, they had questioned the arbitrator who had explained that there had been an oversight and that they believed that there would not be material overlap between the two different sets of proceedings. Halliburton accepted this explanation as being truthful.

Lady Arden noted that the duty of disclosure was a secondary obligation arising from the arbitrator's primary duty to act fairly and impartially. An arbitrator should proceed on the basis that a proposed further appointment involving a common party and overlapping subject matter was likely to require disclosure of a possible conflict of interest. The duty of disclosure was rooted in the duty of impartiality but was also an implied (if not express) term of the arbitrator's appointment. Disclosure was only an option if the conflict was one which would not prevent the arbitrator from acting impartially.

If there is a concern about confidentiality, in general, high-level disclosure about a proposed appointment in a further arbitration can be made without any breach of confidentiality by naming only the common party (who may be taken to have consented to disclosure) but not the other parties to the arbitration. Lady Arden said that:

"the implied term as to confidentiality is independent of the implied term that the arbitrator should comply with his impartiality duty. It is truly a self-standing term."

However, if further information that is confidential is reasonably required by a party to make that assessment and that consent is not forthcoming, then the arbitrator would have to decline the proposed appointment. That said, in ICC and LCIA matters, parties are taken to impliedly consent to the disclosure of limited information regarding their arbitrations.

At the time, it had not been clear that there was a legal duty of disclosure. The Supreme Court noted that there was therefore no likelihood of Chubb gaining any advantage by reason of overlapping references. There was also no question of the arbitrator having received any secret financial benefit or basis for inferring any unconscious ill will on his part. This meant that Halliburton's appeal failed.

Whilst non-disclosure is potentially serious, it is only a factor to be taken into account in considering the issue of apparent bias. By itself, non-disclosure of a fact or circumstance which should have been disclosed but does not on examination give rise to justifiable doubts as to the arbitrator's impartiality will not of itself justify an inference of apparent bias. Something more is required.

Further, the Supreme Court also made it clear that they saw no material difference in the application of the duty of disclosure here, under English common law, and the similar obligations to be found in the IBA Guidelines or other major institutional rules. Finally, Lord Kerr quoted with approval the words of the judge at first instance, Mr Justice Popplewell, that a party-appointed arbitrator in English law is expected to come up to precisely the same high standards of fairness and impartiality as the person chairing the tribunal:

"[T]he duty to act independently and impartially involves arbitrators owing no allegiance to the party appointing them. Once appointed they are entirely independent of their appointing party and bound to conduct and decide the case fairly and impartially. They are not in any sense ... a representative of the appointing party or in some way responsible for protecting or promoting that party's interests."

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